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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>LEON FRANCIS BLAKEMAN, IV,<br>Defendant and Appellant. | E053491<br>(Super.Ct.No. RIF153452)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge. (Retired judge of the former Tulare Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood, and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Leon Francis Blakeman IV, accosted a 13-year-old boy twice as he

rode his bike, offering $20 if the boy would allow defendant to touch and suck his privates. A jury convicted defendant of two counts contacting a minor with intent to commit a sexual offense (Pen. Code, § 288.3, subd. (a)), and a true finding was made as to two strike allegations (Pen. Code, § 667, subd. (e)(2)(A)) as well as one prior serious felony conviction (Pen. Code, § 667, subd. (a)) by the court. Defendant was sentenced to prison for an indeterminate term of 25 years to life, plus a consecutive determinate term of five years for the serious felony prior conviction, and he appeals.

On appeal, defendant argues that (1) there was insufficient evidence of his identity as the perpetrator to support the conviction; and (2) introduction of documentary evidence of his prior convictions for sexual offenses, as evidence of uncharged prior sexual acts under Evidence Code section 1108, violated his right to confrontation. We affirm.

## BACKGROUND

On September 30, 2009, Joshua was late for school but took his usual route as he rode his bike to school. His route took him through a shopping center on Alessandro Boulevard in Moreno Valley. In front of the El Super supermarket, a white male later identified as defendant approached Joshua and asked if Joshua wanted to make $20. Joshua said no and went on.

Near a pawn shop, Joshua's bicycle pedal came off and he stopped to fix it. As he tried to replace the pedal, defendant approached Joshua a second time and asked if Joshua wanted to earn $20. Defendant told Joshua that all he had to do was let defendant play with his private and let defendant suck his private. Defendant then grabbed Joshua's

hand with one hand, and grabbed the handlebar of the bike with his other hand to prevent Joshua from leaving. Joshua pushed defendant off. Joshua described defendant as having no facial hair, wearing a black shirt, blue jeans and a New York Yankees baseball cap.

Just then, a car containing Dextaur Newberry, his wife, and daughter, went by and observed a strange man walking with his hands on Joshua's handlebars. Dextaur Newberry knew Joshua because the Newberry family attends the same church that Joshua's family attended. The unknown man was caucasion, slender of build, had grayish hair, and wore a flannel type shirt, a baseball cap, and glasses. Dextaur made a U-turn into the shopping center where Joshua and defendant were walking and called out to ask Josh who he was with and why he wasn't in school. Defendant took off. Joshua proceeded on to school with Dextaur and his family driving alongside, escorting him to school. Dextaur's wife called the school principal and asked the school to contact Joshua's family because she did not know Joshua's telephone number.

A surveillance camera captured the second encounter between defendant and Joshua with the approach of the Newberry vehicle. Two weeks after the incident, defendant was contacted by sheriff's detectives. Defendant admitted being at the shopping center on the date and at the time of incident, and admitted he talked to a boy in the parking lot. He indicated the boy asked for 50 cents, and that he told the boy to go away. When shown a picture of Joshua, defendant stated he was not the boy to whom he talked that morning.

The sheriff's detective showed a six-pack photographic lineup to Joshua, Dextaur Newberry, and Dextaur's wife. Joshua identified defendant's picture. Dextaur was not able to make an identification, and when asked if anyone looked similar to the person, Dextaur pointed to someone other than the defendant. Dextaur's wife identified someone other than the defendant and stated she was 100 percent sure that was the person she saw.

Defendant was charged with two counts of contacting a minor with the intent to commit a sexual offense. (Pen. Code, § 288.3, subd. (a).) It was further alleged he had been previously convicted of a felony for which he had served a prison term (prison prior) (Pen. Code, § 667.5, subd. (b)), as well as a prior serious felony conviction (nickel prior) (§ 667, subd. (a)), and two prior serious or violent felonies under the Strikes law. (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A).) The substantive counts were tried by a jury and he was convicted of both counts. Defendant waived jury on the prior conviction allegations and made a motion to dismiss the Strike allegations pursuant to Penal Code section 1385.[1] The court denied the motion to dismiss the Strikes but did order one of the prior convictions stricken.[2]

The court denied probation and sentenced defendant to an indeterminate term of 25 years to life on both counts 1 and 2 under the Strikes law, but stayed the term on count

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[1] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530-531.

[2] Although the court did not specify which prior conviction was being stricken, we assume it was the prison prior, since it is not mentioned in the abstract of judgment and because section 654 would preclude imposition of enhancements for both the prison prior (Pen. Code, § 667.5, subd. (b)) and the nickel prior, based on the same conviction. (Pen. Code, § 667, subd. (a)); see *People v. Jones* (1993) 5 Cal.4th 1142, 1150-1153.)

2 pursuant to Penal Code section 654. The court imposed a determinate term of five years for the nickel prior to run consecutively. On May 2, 2011, defendant timely appealed.

## DISCUSSION

### 1. There Is Sufficient Evidence of Identification to Support the Convictions.

Defendant argues there was no credible identification of defendant which undermines his conviction. Defendant reminds us that the "vagaries of eyewitness identification are well-known" (*United States v. Wade* (1967) 388 U.S. 218, 228 [87 S.Ct. 1926, 18 L.Ed.2d 1149] [in-court identification tainted by suggestive pretrial lineup]), and that eyewitness identification is inherently unreliable. We are aware of the problems inherent in eyewitness identification, but as defendant acknowledges, we are governed by the substantial evidence standard of review.

On appeal, the test of legal sufficiency is whether there is substantial evidence to support the conviction. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Evidence that meets this standard satisfies constitutional due process and reliability concerns. (*People v. Carter* (2005) 36 Cal.4th 1114, 1156.) While we must determine that the supporting evidence is reasonable, inherently credible, and of solid value, we must also review the evidence in the light most favorable to the prosecution, and must presume every fact that the jury could reasonably have deduced from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.)

Issues of witness credibility are for the jury's determination. (*People v. Boyer, supra,* 38 Cal.4th at p. 480; *People v. Jones* (1990) 51 Cal.3d 294, 314.) Absent evidence that the testimony is physically impossible or inherently improbable, the testimony of a single witness may be sufficient to prove the defendant's identity as the perpetrator of a crime, even when there is a significant amount of countervailing evidence. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052; *People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate. (*People v. Allen, supra,* 165 Cal.App.3d 616, citing *People v. Fagalilo* (1981) 123 Cal.App.3d 524, 530-531.) The same is true for uncertainties or discrepancies in witnesses' testimony. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1259.) Confusion, or lack of clarity and positiveness in a witness' identification testimony goes to the weight, not the admissibility of the testimony. (*People v. Rist* (1976) 16 Cal.3d 211, 216.) Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (*People v. Lewis* (2001) 26 Cal.4th 334, 361.)

Here, Joshua testified credibly about the incident and his testimony was corroborated by independent witnesses who observed a man, identified as the defendant by Joshua, following the boy with his hand on the handlebars of Joshua's bicycle. Joshua's description of the suspect was further corroborated by the fact that the man in the surveillance video appeared to match the description given by Joshua. The various

witnesses gave similar descriptions of the suspect and Joshua picked out defendant's picture in the photographic lineup in seconds.

The fact defendant had facial hair two weeks after the incident does not render Joshua's identification unreliable, as that was a question for the jury to decide. (*People v. Walker* (1957) 154 Cal.App.2d 143, 148.) Further, while two other witnesses were unable to pick defendant's picture out of the lineup, this fact does not lead to the inevitable conclusion that the defendant was wrongfully identified. After all, the defendant admitted being at the location of the incident at the time it was to have occurred, although he denied the actions attributed to him.

Defendant's trial counsel ably pointed out the discrepancies in the identification, as well as the failures of Dextaur and his wife to correctly identify defendant in the photographic lineup. It was for the jury to decide if the defendant was properly identified as the perpetrator. Having done so, we are not free to second guess its finding because we neither reweigh the evidence nor reevaluate the credibility of witnesses. (*People v. Jennings* (2010) 50 Cal.4th 616, 638; see also *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Joshua's testimony, including his identification of defendant as the perpetrator, coupled with defendant's admission that he was present at the approximate time and place of the incident, support the jury's verdict.

**2. Admission of Penal Code Section 969b Packets As Evidence of the Uncharged Prior Sexual Offenses Pursuant to Evidence Code Section 1108, Did Not Violate Defendant's Confrontation Rights.**

Defendant argues that he was deprived of his rights to confrontation, due process and a fair trial by the unlimited and highly prejudicial admission of evidence of his prior convictions for sexual offenses pursuant to Evidence Code section 1108. His attack is multipronged: he asserts (a) the court failed to conduct an analysis pursuant to Evidence Code section 352 to determine whether the prejudicial effect of the "ancient convictions" outweighed any probative value; (b) the Penal Code section 969b packet contained inadmissible testimonial hearsay in violation of his right to confrontation; and (c) the admission of highly inflammatory, marginally probative evidence violated his right to due process. We disagree.

Evidence Code section 1108, subdivision (a), provides that, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Evidence Code section 352 permits the court, in its discretion, to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. We apply the abuse of discretion standard in reviewing the trial court's resolution of the issue. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

*a. The Court Conducted an Evidence Code Section 352 Analysis.*

Defendant's first argument is that the court failed to conduct an analysis pursuant to Evidence Code section 352 to determine whether the prejudicial effect of the convictions outweighed any probative value. Remoteness or staleness of prior conduct is an appropriate factor to consider in a Evidence Code section 352 analysis. (*People v. Harris* (1998) 60 Cal.App.4th 727, 739.)

Defendant's argument is not supported by the record. Defendant quotes at length from the in limine hearing at which the court considered the issue of remoteness under Evidence Code section 352 on the record. There, defense counsel expressly argued that the age of the prior conviction (i.e., remoteness) rendered it inadmissible. The court considered the age of the prior conviction and acknowledged that the "1108 evidence obviously is prejudicial to the defendant -- [¶] . . . [¶] . . . -- no matter when it happened."

The court conducted a full analysis but simply disagreed with counsel's position, holding that the age of the prior uncharged offense was not so remote that it had no relevance, within the meaning of Evidence Code section 352.

*b. The Penal Code Section 969b Packet Did Not Constitute Testimonial Hearsay.*

Next, defendant argues that the court erred in allowing the People to introduce the Evidence Code section 1108 evidence by way of a Penal Code section 969b packet, because the prior packet contained testimonial hearsay, in violation of *Crawford v. Washington* (2004) 541 U.S. 36, 68 [124 S.Ct. 1354, 158 L.Ed.2d 177], and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314]. Defendant does not cite *People v. Moreno* (2011) 192 Cal.App.4th 692, 707, or *People v.*

*Taulton* (2005) 129 Cal.App.4th 1218, 1225, both of which decisions have upheld the admission of Penal Code section 969b packets as against a constitutional challenge under the confrontation clause. Additionally, defendant did not preserve an objection on constitutional grounds (see *People v. Fuiava* (2012) 53 Cal.4th 622, 670 [defendant's failure to raise a distinct constitutional claim at trial forfeits such a claim on appeal]), but we exercise our discretion to reach the merits.

Evidence Code section 1108 does not limit the prosecution to live testimony and decisional authority permits the use of conviction documents contained in Penal Code section 969b packets as evidence of the prior uncharged sexual offense. (*People v. Wesson* (2006) 138 Cal.App.4th 959, 967-969.) Thus, documentary evidence of a conviction may be admitted to demonstrate that the defendant committed another sexual offense. (*Id.* at pp. 968; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1461 [Evidence Code, § 452.5 permits use of certified official records of conviction to prove not only the fact of a conviction, but the commission of the underlying offense].)

The confrontation clause applies only to testimonial hearsay statements and not to such statements as are nontestimonial. (*Davis v. Washington* (2006) 547 U.S. 813, 823-824 [126 S.Ct. 2266, 165 L.Ed.2d 224], quoting *Crawford v. Washington, supra,* 541 U.S. at p. 51.) Testimonial statements are those which a declarant would reasonably expect to be used prosecutorially, or would be available for use at a later trial. (*Crawford,* at pp. 51-52.) Evidence Code section 452.5 creates an exception to the hearsay rule for qualifying court records. (*People v. Duran, supra,* 97 Cal.App.4th at pp. 1460-1461; see also *People v. Rauen* (2011) 201 Cal.App.4th 421, 425.)

Defendant does not establish that certified records of conviction were "'crafted in anticipation of being used in future court proceedings,'" or demonstrate that the primary or sole purpose of the documents within the Penal Code section 969b packets was to provide evidence in a subsequent prosecution. (*People v. Moreno, supra,* 192 Cal.App.4th at p. 710.) The *Taulton* court determined that the documents were prepared to document acts and events relating to convictions and imprisonments. (*People v. Taulton, supra,* 129 Cal.App.4th at p. 1225.) This is true.

The abstract of judgment constitutes the commitment; it is the order sending the defendant to prison and the process and authority for carrying the judgment and sentence into effect. (Pen. Code, § 1213; *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The *Moreno* court also concluded that the prior conviction documents were created primarily for administrative purposes of the Department of Corrections and Rehabilitation. (*People v. Moreno, supra,* 192 Cal.App.4th at p. 710.)

We agree with these decisions and conclude that admission of the documents in the Penal Code section 969b packet did not implicate defendant's rights under the confrontation clause (*Crawford v. Washington, supra,* 541 U.S. at p. 56) and did not violate his due process rights.

*c. The Evidence Code Section 1108 Evidence Was Not Highly Inflammatory and Did Not Violate Due Process.*

Finally defendant argues that the admission of the prior conviction evidence, which he describes as "highly inflammatory and marginally probative," violated his due process rights, relying extensively on *People v. Harris, supra,* 60 Cal.App.4th 727. We

note that defendant did not preserve this particular claim in the trial court, where defense counsel focused on the remoteness of the prior conviction, and the form of the evidence (Pen. Code, § 969b prior conviction packets versus live witness testimony), in arguing for its exclusion. This precise claim was forfeited. (See *People v. Holt* (1997) 15 Cal.4th 619, 666; *People v. Polk* (2010) 190 Cal.App.4th 1183, 1194 [failure to object on the precise ground asserted on appeal results in forfeiture, even if defendant asserted other arguments].) Nevertheless, even if the issue had been preserved, exclusion was not required.

This case is easily distinguishable from *Harris*, on which defendant relies heavily. In *Harris*, the defendant was a mental health nurse accused of preying on women who were vulnerable due to their respective mental health conditions. The incidents involving these victims occurred in 1995. At trial, the prosecution introduced evidence that in 1972, defendant unlawfully entered the apartment of a woman while she slept, beat her to unconsciousness, and used a sharp instrument to rip through the muscles from her vagina to her rectum, then stabbed her in the chest with an ice pick, leaving a portion of the pick inside the victim. The reviewing court in *Harris* was properly concerned with the inflammatory nature of the prior uncharged acts, characterizing it as "inflammatory *in the extreme.*" (*People v. Harris*, *supra*, 60 Cal.App.4th at p. 738.)

The *Harris* court cited *People v. Ewoldt* (1994) 7 Cal.4th 380, 405, where the Supreme Court deemed it important to consider whether the testimony describing the uncharged acts was no stronger and no more inflammatory than the testimony concerning the charged offenses when evaluating prior uncharged acts. (*People v. Harris*, *supra*, 60

Cal.App.4th at pp. 737-738.) In *Harris*, the prior incident was far more violent than the offenses for which the defendant was on trial, was strikingly dissimilar to the current charges, in addition to being remote in time, causing the reviewing court to conclude that the "inflammatory and speculative nature of the evidence weighs sharply in favor of exclusion." (*Id.* at pp. 738, 740-741.)

In this case, the offenses involved in the prior acts were not "inflammatory in the extreme," and their presentation by way of documentary evidence actually mitigated any potential for prejudice. The Penal Code section 969b packet admitted into evidence includes only the abstract of judgment, the fingerprint card, and the chronological history of defendant while committed to state prison. No violent details of the sexual offenses were presented to inflame the jury.

Nor were the prior offenses in the present case "strikingly dissimilar" to the current charges such that relevance is attenuated. Lewd and lascivious acts (Pen. Code, § 288, subd. (a)), and, more particularly, attempted lewd or lascivious acts with a child under 14 (Pen. Code, §§ 664, 288, subd. (a)), of which crimes defendant was convicted previously, are in the same class of crime as contacting a minor with the intent to commit such an act. (Pen. Code, § 288.3, subd. (a).) In the context of propensity evidence, similarity between the uncharged prior acts and the current charged acts weighs in favor of admissibility.

We must therefore determine whether remoteness alone required exclusion. We acknowledge that remoteness of prior offenses relates to the question of predisposition, but significant similarities between the prior and the charged offenses may balance out

the remoteness. (*People v. Branch* (2001) 91 Cal.App.4th 274, 285, citing *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395.) We also acknowledge that a gap between the known commission of prior and current offenses is not proof that no similar offenses were committed during the interim; it may mean nothing more than that no one came forward to report any sexual offenses. It is speculative to say that the gap between the prior sexual offense and the current offense means that the defendant does not have any actual disposition to commit sexual offenses. Further, the passage of time generally goes to the weight of the evidence, not its admissibility. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1173; *People v. Hernandez* (2011) 200 Cal.App.4th 953, 968.)

The court did not abuse its discretion by admitting the evidence of the prior sexual offenses pursuant to Evidence Code section 1108.

**DISPOSITION**

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.